

STATE OF SOUTH CAROLINA
BEFORE THE PUBLIC SERVICE COMMISSION
DOCKET NOS. 2017-207-E, 2017-305-E, AND 2017-370-E

IN RE:)
)
 Friends of the Earth and Sierra Club,)
 Complainants/Petitioners)
)
 v.)
)
 South Carolina Electric & Gas Company,)
 Defendant/Respondent)

SOUTH CAROLINA ENERGY
USERS COMMITTEE'S
PRE-HEARING BRIEF

IN RE:)
 Request of the Office of Regulatory Staff)
 for Rate Relief to South Carolina Electric)
 & Gas Company's Rates Pursuant to S.C.)
 Code Ann. §58-27-920)

IN RE:)
)
 Joint Application and Petition of South)
 Carolina Electric & Gas Company and)
 Dominion Energy, Inc. for review and)
 approval of a proposed business)
 combination between SCANA)
 Corporation and Dominion Energy, Inc.,)
 as may be required and for prudence)
 determination regarding the abandonment)
 of the V.C. Summer Units 2 & 3 Project)
 and associated merger benefits and cost)
 recovery plan.)

The South Carolina Energy Users Committee (“SCECU”) urges the Public Service Commission (“Commission” or “PSC”) to grant ratepayers rate relief.

The Commission has consolidated three related dockets for trial November 1, 2018. Docket No. 2107-207-E was filed by Friends Of The Earth (“FOE”) and the Sierra Club seeking to force the abandonment of South Carolina Electric & Gas Company’s (“SCE&G”) nuclear plants under construction at VC Summer and seeking disallowance of the costs of the project.

Docket No. 2017-305-E was opened as the result of the Office of Regulatory Staff (“ORS”) filing seeking rate relief pursuant to S.C. Code Ann. § 58-27-920.

Docket No. 2017-370-E was opened to consider SCE&G’s and Dominion’s joint petition seeking approval of the Companies’ merger, a prudency determination regarding the abandonment of the units and recovery the capital costs in the project. In their joint application in Docket No. 2017- 370- E, Dominion and SCANA seek approval of their proposed merger

The Base Load Review Act

The Base Load Review Act (“BLRA”) provides that, as long as a nuclear plant is constructed in accordance with the approved schedules, estimates and projections, as adjusted by the inflation indices, a utility must be allowed to recover its capital costs related

to plant through revised rate filings or general rate proceedings.¹ S.C. Code Ann. §58-33-275(C). The purpose of the BLRA,

is to provide for the recovery of the prudently incurred costs associated with new base load plants, as defined in Section 58-33-220 of Article 4, when constructed by investor-owned electrical utilities, while at the same time protecting customers of investor-owned electrical utilities from responsibility for imprudent financial obligations or costs.
Base Load Review Act Section 1(A).

See *South Carolina Energy Users Committee v. The South Carolina Public Service Commission*, 388 S.C. 495; 697 S.E.2d 592 (2010).

A base load review order issued pursuant to the BLRA,

means an order issued by the commission pursuant to Section 58-33-270 establishing that if a plant is constructed in accordance with an approved construction schedule, approved capital costs estimates, and approved projections of in-service expenses, as defined herein, the plant is considered to be used and useful for utility purposes such that its capital costs are prudent utility costs and are properly included in rates. S.C. Code Ann. Section 58-33-220(4).

The traditional concept of rate making in South Carolina is based on historical data with adjustments permitted for known and measurable out of period changes. *Hamm v. Southern Bell Telephone & Telegraph Company*, 302 S.C. 132, 394 S.E. 2nd 311 (1990); *South Carolina Cable Television Association v. The Public Service Commission of South Carolina*, 313 S.C. 48, 437S.E. 2nd 38(1993). The BLRA breaks from traditional concepts of ratemaking by allowing a utility advanced cost recovery of certain of its capital costs of constructing nuclear plants based upon anticipated capital costs to be expended many years

¹ A utility must be allowed to recover its weighted average cost of capital through annual revised rates. The statute authorizes the Commission to grant revised rates after ORS review and aggrieved parties may challenge the revised rates only after they are granted. Sections 58-33-280, and 58-33-285.

into the future, long before they are used and useful for generating electricity. Equally important, the BLRA provides a utility an upfront determination of the prudence of the utility's decision to build the plants, a determination which may not thereafter be challenged.

To benefit from the advanced cost recovery of the construction of a nuclear plant and an early determination of the prudence of constructing a nuclear plant, a utility may elect to file its application under the BLRA. S.C. Code Ann. § 58-33-230(A). SCE&G elected to file its application under the BLRA and was issued a Base Load Review Order by the Commission. Order No. 2009-104A. The benefits available under the BLRA are conditioned upon the utility constructing the plant on schedule and on budget. The BLRA provides that,

(A) A base load review order shall constitute a final and binding determination that a plant is used and useful for utility purposes, and that its capital costs are prudent utility costs and expenses and are properly included in rates so long as the plant is constructed or is being constructed within the parameters of:

- (1) the approved construction schedule including contingencies; and
 - (2) the approved capital costs estimates including specified contingencies.
- S.C. Code Ann. Section 58-33-275(A)

As long as a nuclear plant is constructed in accordance with the approved schedules, estimates and projections, as adjusted by the inflation indices, a utility must be allowed to recover its capital costs related to the plant through revised rate filings or general rate proceedings. S. C. Code Ann. § 58-33-275(C).

Moreover, the BLRA provides that a utility can modify its schedules, estimates and projections. S. C. Code Ann. §§ 58-33-270(E) provides,

(E) As circumstances warrant, the utility may petition the commission, with notice to the Office of Regulatory Staff, for an order modifying any of the schedules, estimates, findings, class allocation factors, rate designs, or conditions that form part of any base

load review order issued under this section. The commission shall grant the relief requested if, after a hearing, the commission finds:

- (1) as to the changes in the schedules, estimates, findings, or conditions, that the evidence of record justifies a finding that the changes are not the result of imprudence on the part of the utility; and
- (2) as to the changes in the class allocation factors or rate designs, that the evidence of record indicates the proposed class allocation factors or rate designs are just and reasonable.

SCE&G sought and was granted relief under S.C. Code § 58-33-270(E) on five occasions. See Order No. 2010-12; Order No. 2011-345; Order No. 2012-884; Order No. 2015-661; and Order No. 2016-794. The Commissions application of S.C. Code § 58-33-270(E) was affirmed by the Supreme Court. *South Carolina Energy Users Committee v. South Carolina Electric & Gas Company*, 410 S.C. 348; 764 S.E.2d 913 (2014). SCE&G sought and was awarded revised rate increases on nine occasions: Order No. 2009-104(A); Order No. 2009-696; Order No. 2010-625; Order No. 2011-738; Order No. 2012-761; Order No. 2013-680(A); Order No. 2014-785; Order No. 2015-712; and Order No. 2016-758.

The BLRA provides for the recovery of certain capital costs for a plant which is prudently abandoned by the utility. With respect to the recovery of the capital costs of abandonment of a nuclear plant, the utility is limited to prudently incurred costs, but the utility's

...recovery of capital costs and the utility's cost of capital associated with them may be disallowed only to the extent that the failure by the utility to anticipate or avoid the allegedly imprudent costs, or to minimize the magnitude of the costs, was imprudent considering the information available at the time that the utility could have acted to avoid or minimize the costs.
S. C. Code Ann. § 58-33-280(K)

While the meaning term "prudency" as applied to the BLRA was derived from traditional

concepts of rate making, the General Assembly has codified the meaning of the term “prudence” S.C. Code § 58-33-220, as amended. In addition to the concept that prudence requires a high standard of caution, care and diligence,

'Prudent', 'prudence', or 'prudence' also requires that any action or decision be made in a timely manner.

In determining whether any action or decision was prudent, the commission shall consider, including, but not limited to:

- (a) whether the utility acts in a timely manner, with any passage of time which results in increased costs or expense prior to the utility acting or making the decision weighing against a finding of prudence;
- (b) whether prior actions or decisions by the utility were imprudent and such imprudent actions led to a decision by the utility that could otherwise be prudent. Such circumstances weigh against a finding of prudence; and
- (c) any other relevant factors, including commission of a fraudulent act, which are deemed not to be prudent. S.C. Code Ann. § 58-33-220, as amended.

Argument

Having ceased construction of the nuclear plants on or before July 31, 2017, SCE&G was no longer in compliance with the BLRA. Order No. 2016-794, issued November 28, 2016, approved a budget for the nuclear plants of \$7.7 billion and completion dates for the plants of August 31, 2019 and August 31, 2020. On August 1, 2017, SCE&G filed an application seeking a prudence determination of the abandonment of construction of the plants in Docket No. 2017-244-E in which the Company informed the Commission that the forecasted costs to complete the nuclear plants would be approximately \$8.8 billion, \$1.1 billion more than the costs approved in Order No. 2016-794. Further, SCE&G informed the Commission that the

forecasted completion dates were December 31, 2022 and March 31, 2024. SCE&G Petition, page 6. SCE&G was no longer in compliance with Order No. 2016-794.

SCE&G's failure to comply with the BLRA prohibits it from any further recovery under the BLRA

SCE&G elected to file to build its nuclear plants under the BLRA as opposed to filing under less advantageous alternate regulatory statutes offering none of the benefits to the utility of the BLRA. Accordingly, if SCE&G is entitled to any recover at all in the consolidated dockets, it must demonstrate that it is in compliance with the BLRA. SCE&G has taken advantage of every benefit under the BLRA to include the early prudency determination of the decision to build the nuclear plants, authority for recovery of billions of dollars in cost overruns and most important, nine revised rate increases totaling approximately \$2 Billion on ratepayers who will never see one kilowatt of electricity from the nuclear plants.

Recovery of rates through revised rates is a statutory benefit to which SCE&G is entitled only so long as it is compliance with the schedule, estimates and projections in its BLRA Order. S.C. Code Ann. 58-33-275(C). The nuclear units are no longer being constructed. Consequently, SCE&G is no longer entitled to recovery of the revenues generated by the revised rates or recovery of capital costs of the abandoned units. *South Carolina Electric and Gas Company, v. Randall, et al.* C.A. No.:3:18-cv-01795-JMC Order at p. 20 -23. The Federal District Court's analysis reflected that for the purposes of recovery under the BLRA, three different rate periods are at issue.

The court understands there to be three different rate periods at issue. This first period is the time during which SCE&G was either constructing or otherwise abandoning the Project and charging ratepayers the revised rates approved by the nine base load review orders of the PSC. The second rate period is the time during which SCE&G was no longer constructing the Project but continued to charge the revised rates. The third time period will be governed by the outcome of the abandonment proceeding currently ongoing before the PSC, as the PSC must determine when SCE&G was either no longer constructing the Project or otherwise abandoning the Project and whether SCE&G decision to abandon was prudent, entitling SCE&G to continue to recover the capital costs of the Project. *See* S.C. Code Ann. § 58-33-280(K).

The Federal Court concluded that during the second and third periods, the “so long as the plan is constructed or being constructed” language ceases to constrain the discretion of the Commission. Order at pp. 22 – 23. To recover revised rates or abandonment costs under the BLRA, SCE&G must be constructing the plants at the time the Company files for recovery under the BLRA. It is undisputed that SCE&G had ceased construction seventeen months prior to filing for rate relief in this docket. Having ceased construction prior to its request for abandonment costs, the Company is precluded by S.C. Code Ann. § 58-33-275(A) from recovering these costs and the request fails under the provisions of the BLRA.

In addition, the SCE&G’s decision to abandon the property is imprudent because it was untimely made. SCE&G unnecessarily delayed its decision to abandon construction of the units until after construction had ceased. S.C. Code Ann. § 58-33-220, as amended, precludes recovery of the abandonment costs.

The decision to deny SCE&G recovery of revised rates and abandonment costs is compelled by South Carolina decisional law. It is settled law that for a party to recovery the benefits afforded it under a statute, that the party must otherwise be in compliance with the

other provision of that statute. SCE&G has ceased construction of the units and is no longer in compliance with Order No. 2016-794. Yet, SCE&G has accepted recovery of \$2 billion in revised rates and has benefited from the upfront determination of its decision to build the units. Having elected to construct and finance its nuclear plants pursuant to the BLRA, having accepted the benefits provided by the BLRA, and having failed to comply with the BLRA, SCE&G is precluded as a matter of law from the continued recovery of revised rates revenue and capital costs for the abandoned nuclear plants under the BLRA. *Southern Soya Corp. of Cameron v. Wasson*, 252 S.C. 484, 167 S.E.2d 311 (1969); *Floyd v. Nationwide Mut. Ins. Co.*, 367 S.C. 253, 626 S.E.2d 6 (2005).

SCE&G protests that if it is forced to comply with State law and is denied recovery of revised rates revenue and abandonment costs, it will be forced to file bankruptcy. First, in every rate docket in memory, SCE&G warns that if it is not granted full rate relief, the financial markets would punish the utility. Thus, a healthy skepticism is in order. It cannot be disputed that SCANA reported an increase in 2018 third-quarter earnings of \$67 million, or 47 cents per share, compared to earnings of \$34 million, or 24 cents per share, for the third quarter of 2017. Despite its current circumstances apparent in this record, the financial markets have responded favorably to SCANA's decision to cut its dividend, a necessary and prudent decision. SCANA's board of directors continue to pay a dividend declaring a quarterly dividend of 12.37 cent per share.

Kevin W. O'Donnell, CFA, will testify that SCE&G has sufficient revenues and financial depth to absorb the loss of the revised rates revenue and the failure to recover abandonment costs. Mr. O'Donnell will testify that, "[o]n June 29, 2018, SCANA Corp.

announced it was cutting its dividend 80% so that its quarterly dividend to-be paid would fall from 61.25 cents per share to 12.37 cents per share. This cut in the dividend payment amounts to a savings to SCANA Corp. of approximately \$279 million. The credit rating agencies reacted positively to the news of a dividend cut. Moody's specifically cites the dividend cut in its July 2, 2018 report on SCANA when it states:

The confirmation also considers SCANA's credit supportive announcement last week that it would cut its dividend by 80% in response to these legislative developments", added Schumacher (Vice President -Senior Credit Officer at Moody's) ²,

(O'Donnell direct testimony, page 6, lines 1 – 17). Mr. O'Donnell will testify further that SCANA may cut or eliminate its dividend to secure its credit rating. Elimination of the dividend could save SCANA an additional \$70 million per year. (O'Donnell direct testimony, page 9, line 24 – page 10, line 2).

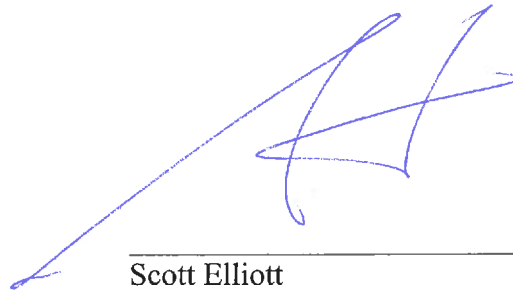
In addition, Mr. O'Donnell will testify that the cost of an SCE&G downgrade will not materially impact the utility or its ratepayers. Mr. O'Donnell will testify that "the cost of an SCE&G downgrade will cost consumers approximately \$110 million over the next 30 years, meaning that the average cost of the downgrade is roughly \$3.67 million per year. The rate cut proposed by the ORS is \$445 million per year for 30 years. Clearly, the higher cost of debt should not be a determinative factor in assessing the ORS petition for rate reduction." (O'Donnell direct testimony page 12, lines 9 – 14).

² Moody's report July 2, 2018, "Moody's confirms SCANA, SCE&G and PSNC, rating outlook negative", p. 1

SCANA has other opportunities to shore up its finances for the benefit of its ratepayers. Mr. O'Donnell will testify that SCANA may sell its North Carolina subsidiary, PSNC for an amount sufficient to pay most if not all of its capital costs for which it is seeking recovery from its South Carolina ratepayers in this docket. (O'Donnell direct testimony page 8, line 1 – page 9, line 2).

Conclusion

For the foregoing reasons, SCE&G is precluded from recovery of revenue from revised rates and from recovery of abandonment costs. To the extent that the ORS and other intervenors in this docket raise challenges to SCE&G's recovery of revenues from revised rates or to SCE&G's recovery of abandonment costs, SCEUC would support those challenges.



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